Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1979

NO. 79-1369

HIGHLANDS INSURANCE COMPANY,

Respondent

v.

AMERICAN MARINE CORPORATION,
LOUISIANA MATERIALS CO., INC.
AND SEA DRILLING CORPORATION

Petitioners

PETITION OF AMERICAN MARINE CORPORATION, LOUISIANA MATERIALS CO., INC. AND SEA DRILLING CORPORATION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIFTH CIRCUIT

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APPEALS FOR THE FIFTH CIRCUIT

American Marine Corporation, Louisiana Materials Co., Inc. and Sea Drilling Corporation, defendants in the captioned cause, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on December 5, 1979 (original decision) and on January 18, 1980 (per curiam denial of rehearing).

CITATIONS TO OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit dated December 5, 1979 (Circuit Judges Tuttle, Goldberg and Randall) is reproduced in the supplement beginning at p. A-1 and is reported in F.2d 1482. The per curiam opinion of the United States Court of Appeals for the Fifth Circuit denying rehearing dated January 18, 1980, is reproduced in the supplement beginning at page A-12, and is not reported.

JURISDICTION

The per curiam opinion of the United States Court of Appeals for the Fifth Circuit denying rehearing in this cause was entered on January 18, 1980. This petition for certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1), 62 Stat. 928.

QUESTION PRESENTED

Whether, in a diversity action, the Court of Appeals has decided a question of state law in conflict with applicable Louisiana law, where an insurance company's Retrospective Rating Plan was found effective even though not filed with the rating authority designated, where state law required such a filing, and further found a combination of policies for rating purposes pursuant to that Retrospective Rating Plan

to be effective without the election to combine being filed as provided by state law.

STATUTES INVOLVED

REVISED STATUTES

L.S.A. - R.S. 22:620

§ 620. Approval of forms

A. No basic insurance policy form other than surety bond forms, or application form where written application is required and is to be attached to the policy,or be a part of the contract or printed life or health and accident rider or endorsement form shall be issued, delivered, or used unless it has been filed with and approved by the commissioner of insurance. This Section shall not apply to policies, riders or endorsements designed to delineate the coverage for and used with relation to insurance upon a particular subject; nor which relates to the manner of distribution of benefits or to the reservation of rights and benefits under such policy, and which is used at the request of the individual policyholder, contract holder or certificate holder. Any insurer may insert in its policies any provisions or conditions required by its plan of insurance or method of operation which are not prohibited by the provisions of this Code.

B. Every such filing shall be made not less than thirty days in advance of any such issuance, delivery, or use. At the expiration of thirty days the form so filed shall be deemed approved unless prior thereto it has been affirmatively approved or disapproved by order of the commissioner of insurance. The commissioner of insurance may extend by not more than an additional fifteen days the period within which he may so affirmatively approve or disapprove any such form, by giving notice of such extension before expiration of the initial thirty day period. At the expiration of any such period as so extended, and in the absence of such prior affirmative approval or disapproval, any such form shall be deemed approved. The commissioner of insurance may withdraw any such approval at any time for cause. Approval of any such form by the commissioner of insurance shall constitute a waiver of any unexpired portion of such initial fifteen day waiting period.

C. The commissioner of insurance's order disapproving any such form or withdrawing a previous approval shall state the grounds therefor.

D. No such form shall knowingly be so issued or delivered as to which the commissioner of insurance's approval does not then exist.

E. The commissioner of insurance, may, by order, exempt from the requirements of this Section for so long as he deems proper, any insurance document or form or type thereof as specified in such order, to which in his opinion

this Section may not practicably be applied, or the filing and approval of which are, in his opinion, not desirable or necessary for the protection of the public. As amended Acts 1960, No. 176, § 1.

L.S.A. - R.S. 22:1407

§ 1407. Rate filings

A. (1) Every insurer whose rates are subject to regulation under the provisions of this Part shall file with the respective divisions, except as to inland marine risks which by general custom of the business are not written according to manual rates or rating plans, every manual, minimum, class rate, rating schedule or rating plan and every other rating rule, and every modification of any of the foregoing which it proposes to use. Every such filing shall state the proposed effective date thereof and shall indicate the character and extent of the coverage contemplated. Specific inland marine rates on risks specifically rated, made by a rating organization, shall be filed with the marine and Inland Marine Insurance Division.

(2) When a filing made pursuant to this Subsection is not accompanied by the information upon which the insurer or rating organizarion supports such filing, and the division does not have sufficient information to determine whether such filing meets the requirements of this Part, it shall require such insurer or rating organization to furnish the information upon which it supports such filing, and in

such event the waiting period shall commence as of the date such information is furnished. The information furnished in support of a filing may include:

(a) The experience or judgment of the insurer or rating organization making the filing,

(b) Its interpretation of any statistical data it relies upon,

(c) The experience of other insurers or rating organizations, or

(d) Any other relevant facts.

(e) A filing and all information pertaining thereto shall be open to public inspection when filed.

B. An insurer may satisfy its obligation to make such filings by becoming a member of, or a subscriber to, a licensed rating organization which makes such filings, and by authorizing the division to accept such filings on its behalf; provided, that, except with respect to mandatory membership in the Louisiana rating and fire prevention bureau as provided in R.S. 22:1405, nothing contained in this Part shall be construed as requiring any insurer to become a member of or a subscriber to any rating organization.

C. The division shall review filings as soon as reasonably possible after they have been made with it in order to determine whether they meet the requirements of this Part, and no such filing shall become effective except as provided in this Part.

D. Subject to the exceptions specified in Subsection E and Subsection F of this Section, each filing shall be on file for a waiting period of fifteen days before it becomes effective, which period may be extended by the division for an additional period not to exceed fifteen days, if it gives written notice within such waiting period to the insurer or rating organization which made the filing that it needs such additional time for the consideration of such filing. Upon written application by such insurer or rating organization the division may authorize a filing which it has reviewed to become effective before the expiration of the waiting period or any extension thereof. A filing shall be deemed to meet the requirements of this Part unless disapproved by the division within the waiting period or any extension thereof, in accordance with R.S. 22:1408.

E. Specific inland marine rates on risks specially rated by a rating organization shall become effective when filed and shall be deemed to meet the requirements of this Part until such time as the division reviews the filing and so long thereafter as the filing remains in effect.

F. When a filing of adjustments of rates for existing classifications of risks (1) does not involve a change in the relationship between such rates and the expense portion thereof, and (2) does not involve a change in rate relativities among such classifications on any basis other than loss experience, such filing shall become effective upon the date or dates specified in the filing and shall be deemed to meet the re-

quirements of this Part: provided that this Subsection shall not apply to public property rates as provided for under R.S. 22:1421, nor to surety or workman's compensation insurance.

G. Under such rules and regulations as the division shall adopt, the division may, by written order, suspend or modify the requirements of filing as to any kind of insurance, subdivision or combination thereof, or as to classes of risks, the rates for which cannot praticably be filed before they are used. Such order, rules and regulations shall be made known to insurers and to rating organizations affected thereby. The division may make such examination as it may deem advisable to ascertain whether any rates affected by such order meet the requirement of filing as to any kind of insurance. subdivision, or combination thereof, or as to classes of risks, the rates for which can not practicably be filed before they are used. Such orders, rules and regulations shall be made known to insurers and rating organizations affected thereby. The division may make such examination as it may deem advisable to ascertain whether any rates affected by such order meet the standards set forth in Paragraph (2) of R.S. 22:1404.

H. Upon the written application of the insured, stating his reasons therefor, filed with and approved by the division, a rate in excess of that provided by a filing otherwise applicable may be used on any specific risk. As amended Acts 1960, No. 296, § 1; Acts 1964, No. 362, § 1; Acts 1966, No. 136, § 1.

L.S.A. - R.S. 1409

§ 1409. Other rating organizations

A. A corporation, an unincorporated association, a partnership, or an individual, whether located within or outside this state, may make application to the proper division for license as a rating organization for such kinds of insurance, or subdivision or class of risk or a part or combination thereof as are specified in its application and shall file therewith (1) a copy of its constitution, its articles of agreement or association, or its certificate of incorporation, and of its by-laws, rules, and regulations governing the conduct of its business, (2) a list of its members and subscribers, (3) the name and address of a resident of this state upon whom notices or orders of the commission or a division or process affecting such ratin organization may be served, and (4) a statement of its qualifications as a rating organization. If the division finds that the applicant is competent, trustworthy, and otherwise qualified to act as a rating organization and that the public interest would be served by issuing a license to such organization, not heretofore licensed, for a kind or class of insurance subject to this Part, and that its constitution, articles of agreement or association, or certificate of incorporation, and its by-laws, rules and regulations governing the conduct of its business conform to the requirements of law, the division shall issue a license specifying the kinds of insurance, or subdivision or class of risk or part or combination thereof for which the applicant is authorized to act as a rating organization. Every such application shall be granted or denied in

whole or in part by the division within sixty days of the date of its filing with it. Licenses issued pursuant to this Section shall remain in effect for three years unless sooner suspended or revoked by the division. Licenses issued pursuant to this Section may be suspended or revoked by the division after hearing upon notice, in the event the rating organization ceases to meet the requirements of this Subsection. Every rating organization shall notify the division promptly of every change in (1) its constitution, its articles of agreement, or association, or its certificate of incorporation, and its by-laws, rules, and regulations governing the conduct of its business, (2) its list of members and subscribers, and (3) the name and address of the resident of this state designated by it upon whom notices or orders of the commission or appropriate division or process affecting such rating organization may be served.

B. Subject to rules and regulations which have been approved by the proper division as reasonable, each rating organization, including the Louisiana Rating and Fire Prevention Bureau, shall permit any insurer, not a member to be a subscriber to its rating services for any kind of insurance, subdivision, or class of risk or a part or combination thereof for which it is authorized to act as a rating organization. Notice of proposed changes in such rules and regulations shall be given to subscribers. Each rating organization shall furnish its rating services without discrimination to its members and subscribers. The reasonableness of any rule or regulation in its application to subscribers, or the refusal of any rating organization to admit an insurer as a subscriber, shall, at the request of any subscriber or any such insurer, be reviewed by the proper division at a hearing held upon at

least ten days' written notice to such rating organization and to such subscriber or insurer. If the division finds that such rule or regulation is unreasonable in its application to subscribers, the division shall order that such rule or regulation shall not be applicable to subscribers. If the rating organization fails to grant or reject an insurer's application for subscribership within thirty days after it was made, the insurer may request a review by the division as if the application had been rejected. If the division finds that the insurer has been refused admittance to the rating organization as a subscriber without justification, the division shall order the rating organization to admit the insurer as a subscriber. If the division finds that the action of the rating organization was justified the division shall make an order affirming its action.

C. No rating organization shall adopt any rule the effect of which would be to prohibit or regulate the payment of dividends, savings or unabsorbed premium deposits allowed or returned by insurers to their policyholders, members or subscribers.

D. Co-operators among rating organizations or among rating organizations and insurers in rate making or in other matters within the scope of this Part is hereby authorized, provided the filings resulting form such cooperation are subject to all the provisions of this Part which are applicable to filing generally. The commission or the proper division may review such co-operative activities and practices and if, after a hearing, it finds that any such activity or practice is unfair or unreasonable or otherwise inconsistent with the pro-

visions of this Part, the commission or the proper division shall issue a written order specifying in what respects such activity or practice is unfair or unreasonable or otherwise inconsistent with the provisions of this Part, and requiring the discontinuance of such activity or practice.

E. Any rating organization may provide for the examination of policies, daily reports, binders, renewal certificates, endorsements, or other evidences of insurance, or the cancellation thereof, and may make reasonable rules governing their submission. Such rules shall contain a provision that in the event any insurer does not within sixty days furnish satisfactory evidence to the rating organization of the correction of any error or omission previously called to its attention by the rating organization it shall be the duty of the rating organization to notify the division thereof. All information so submitted for examination shall be confidential.

F. Any rating organization may subscribe for or purchase acturial, technical, or other services, and such services shall be available to all members and subscribers without discrimination. As amended Acts 1960, No. 296, § 1.

L.S.A. - R.S. 22:1420

§ 1420. Prior rates continued

No insurer shall make or issue a contract or policy after July 27, 1960, except in accordance with this Part,

except that until the commission shall determine otherwise rates in effect on July 27, 1960, may continue to be used in this state. As amended Acts 1960, No. 296, § 1.

STATEMENT OF THE CASE

Plaintiff, Highlands Insurance Company, issued workmen's compensation and general liability policies to defendants, American Marine Corporation, Louisiana Materials Co., Inc. and Sea Drilling Corporation, for the period of several years. Sea Drilling, because it is engaged in the drilling business, was issued duplicate sets of policies, both onshore policies which were subject to Louisiana regulations and offshore which were not. All of these policies were combined for rating purposes under a single Retrospective Rating Plan.

When various factual and legal disputes arose between Highlands and defendants, defendants declined to pay additional retrospective rating premiums demanded by Highlands and this suit was commenced in 1972, Highlands demanding less than $100,000.00 Subsequently, as additional experience developed, Highlands increased its demands to close to $300.00.

After a lenghty trial on the merits, the District Court found in favor of Highlands and against defendants on all except one issue.

The Fifth Circuit Court of Appeals affirmed the District Court and denied rehearing on January 18, 1980.

Because the provisions of the Retrospective Rating Plan are not pertinent to these writs, it has not been reproduced herein. Suffice it to say that plans are based on the experience of the insureds and that the computations are extremely complex. In the event petitioners were to prevail, it would mean a reduction of in excess of $250,000.00 in the amount of the judgment.

JURISDICTION OF THE COURT BELOW

Jurisdiction of this action is grounded upon the diversity jurisdiction of the United States Code, 28 U.S.C. §1332.

REASONS FOR GRANTING WRITS

I.

THE DISTRICT COURT AND THE COURT OF APPEALS DECIDED AN IMPORTANT STATE QUESTION IN CONFLICT WITH APPLICABLE STATE LAW WHEN THOSE COURTS HELD THAT AN INSURANCE COMPANY'S RETROSPECTIVE RATING PLAN WAS EFFECTIVE EVEN THOUGH NOT FILED WITH THE SOUTHEASTERN COMPENSATION RATING BUREAU, THE DESIGNATED RATING AUTHORITY, WHERE STATE LAW REQUIRES SUCH A FILING AND WHERE THE DISTRICT COURT AND COURT OF APPEALS PERMITTED A COMBINATION OF POLICIES BY RELATED CORPORATIONS FOR PREMIUM COMPUTATION PURPOSES WITHOUT AN ELECTION TO COMBINE BEING FILED AS REQUIRED BY STATE LAW.

A. Non-approval of Retrospective Rating Plan

Louisiana law requires that all insurance policies, including all endorsements, must be filed with the Commissioner of Insurance in order to be effective within the state. The filing may be with the designated rating bureau when such bureaus have been approved for particular policies. L.S.A. - R.S. 22:620, 22:1407, and 22:1420.

In Louisiana, the Southeastern Compensation Rating Bureau is the approved bureau with which policies and endorsements are filed and which approves the use of particular policies, endorsements and rates. L.S.A. - R.S. 22:1409.

Both plaintiff's, Highlands, representative Mr. Young, and the President of the Southeastern Compensation Rating Bureau, Mr. Dingman, testified that the rating plan here at issue had never been filed with the Rating Bureau nor approved for use in the State of Louisiana.

All of the argument on the District Court level was whether related Louisiana policies had been filed with the Rating Bureau, but the policies in question did not have attached to them the Retrospective Rating Plan here in dis-

pute. It is undisputed that the rating plan has never been filed with the Rating Bureau, and had never been approved by the State of Louisiana.

Nevertheless, and in violation of the Louisiana Prohibitory Statute, the Court of Appeals affirmed the District Court and held that the Retrospective Rating Plan was valid and enforceable as to both offshore policies (those affecting continental shelf lands outside of the State of Louisiana) and onshore policies (those affecting risks located in the State of Louisiana).

The decision of the Fifth Circuit clearly contravenes state law in this respect.

B. Failure to File Election to Combine

The Retrospective Rating Plans filed and approved by the State of Louisiana through the Southeastern Compensation Rating Bureau provide that before policies could be combined for rating purposes, there must be an election to combine made by the insured and accepted by the insurer and approved in accordance with law.

Excerpts from the plans approved by the Southeastern Compensation Rating Bureau provide as follows: [1]

---

1. The original of these Plans are found in the Rating Manual of the Southeastern Compensation Rating Bureau.

Retrospective Rating Plans A, B, C and J, Section I(10)(b) -

"The Plan may be applied separately to each policy. However, separate policies issued to an insured may be combined for rating purposes, provided such combination has been elected by the insured and accepted by the insurance carrier prior to the period covered by each policy."

Retrospective Rating Plan D, Section I(1)(b) -

"Workmen's compensation insurance to which this Manual applies may be combined for rating under this Plan with other workmen's compensation insurance and with other third party liability, automobile physical damage, burglary and glass insurance provided such combinations are in accordance with the applicable procedures for the particular carrier, filed as may be necessary and approved as may be necessary under the laws applicable thereto."

Since the Plan involved in the policies at issue had never been approved, the precise wording for a combination thereunder has not been determined. Nevertheless, it is clear that it is the policy of the Rating Bureau to require formal elections to combine with the approval of the Rating Bureau.

The finding by the Court that there was an implicit election to combine is clearly not sufficient pursuant to Louisiana law.

CONCLUSION

It is submitted that it is uncontested that the rating plans involved have never been filed with the Rating Bureau nor approved by the Rating Bureau, and hence are unapproved as required by Louisiana law. Likewise, the election to combine has never been approved by the Rating Bureau. Accordingly, it is submitted that the holding of the Court of Appeals approving the calculations of premiums pursuant to the retrospective rating plan is contrary to the law of the State of Louisiana and, accordingly, writs should be granted to review this decision.

Respectfully submitted,

Neal D. Hobson
Joseph W. Looney
Counsel for Petitioners

CERTIFICATE

I hereby certify that copy of the above and foregoing was mailed, postage prepaid, to counsel for respondent, Mr. A. R. Christovich, Sr., American Bank Building, New Orleans, Louisiana, this 5th day of March, 1980.

APPENDIX A

HIGHLANDS INSURANCE COMPANY,
Plaintiff-Appellee,

v.

AMERICAN MARINE CORPORATION,
Louisiana Materials Co., Inc.,
and Sea Drilling Corporation,
Defendants-Appellants.

No. 77-1577

United States Court of Appeals, Fifth Circuit.

Dec. 5, 1979.

Appeal from the United States District Court
for the Eastern District of Louisiana.

Before TUTTLE, GOLDBERG and RANDALL, Circuit Judges.

TUTTLE, Circuit Judge:

This is an appeal by American Marine Corporation and its two wholly-owned subsidiaries, Louisiana Materials Company, Inc. and Sea Drilling Corporation, from a judgment against them in favor of the original plaintiff, Highlands Insurance Company. The judgment was based upon final audits by the insurer of the payrolls of the insured company's Workman's Compensation policies using a premium basis of $100 per week for 52 weeks of employment for each of the employees. The defendants contended that the audit was

wrong in several respects: (1) That a 26 week basis should have been used because the offshore employees were employed to work "seven on - seven off;" (2) That certain listed employees were executives and not properly included in the schedule for offshore workers; (3) As to those workers who were scheduled as "onshore" workers, the policies were invalid as to them because the retrospective rating plan in effect as to the offshore policies, which purported to apply also to the onshore policies, were invalid because the plan was not filed with the Louisiana Insurance Commission.

[1] The record discloses that some time prior to the issuance of this policy, offshore workers had worked 10 days on and five days off. At that time, it was the custom in the industry for insurance premiums to be calculated on the basis of every week during which an employee performed any services. This would, of course, cover every week of total employment, because the ten day period would extend into parts of two weeks. Sea Drilling Corporation had initially insured with Highlands beginning in 1966. It entered into a three year program beginning in 1969, while American Marine and Louisiana Materials were insured through other companies until January and February of 1971. The policies issued to American Marine and Louisiana Materials included an endorsement which adopted by reference the retrospective rating program attached to the Sea Drilling policy.

When Highlands discovered that Sea Drilling had been reporting its seven on - seven off employees on a 26 week

basis for 1969, it demanded a charge from Sea Drilling, and as a result a meeting was had in May of 1970. Highlands contends that this meeting resolved the issue between the parties by an agreement by Sea Drilling that the basis for premium computation would be 52 weeks per year for 1969 and subsequent years. It is not necessary for us, however, to determine whether this meeting actually produced a final agreement, because the company's agent wrote a letter to Sea Drilling within a few weeks which we find did resolve this issue in favor of the insurance carrier as a basis for Sea Drilling's continuing to insure with Highlands for the future. This letter follows:

> I have received an answer to my letter of July 2, 1970 to Mr. Dan Jones of The Highlands Insurance Company.
>
> Letter reads in part as follows:
>
> "We are therefore [sic] willing to continue coverage on the following basis:
>
> 1. The payroll for 1969 be $814,000.
>
> 2. The rates to be $16. (s) and $5.50 and $8.00 (e) as broken by the increase in limits.
>
> 3. The rates for the 1970 year be $16.00. (s) and $8.00 (e).
>
> 4. That the final audits for 1969 be released on the basis of payroll and rates as indicated above and prompt payment established.

5. The basis of the exposure - payroll for the year 1969 be continued as the basis of our normal method of calculation of the average weekly limitation.

6. That the difference in the years prior to 1969 rather than aduusting the rates or payrolls for the period of time in question be resolved to a settlement basis whereby Sea Drilling would pay two-thirds of the final amount over maximum with adjustments, both debits and credits, being made on an annual basis until all reserves are closed.

As all of us are aware this matter has been drawn out over an extended period of time and since all of the thought and study has gone into it we must insist we have an answer either negatively or affirmatively no later than Tuesday of next week. If affirmatively, we will release the final audits, retro adjustments and necessary endorsements. If negatively, we will have no alternative but to release notice of cancellation of all existing policies and seek final settlement through legal processes."

I would appreciate receiving your answer at your earliest convenience.

Two days following the receipt of this letter, Sea Drilling accepted its terms by a telephone conversation. The significant feature of this letter, as dealing with the seven on - seven off question is the paragraph numbered 1. The dispute that was the subject of the May meeting was over the correctness of the insurance company's contention that the payroll of 1969 was $814,000 rather than half that amount. As already indicated, the insurer's claim was based on the contention that the payroll would represent minimum

$100 per week for 52 weeks, as against the insured's claim that the amount should be based on 27 weeks. Thus, the agreement by the parties that "the payroll for 1969 be $814,000" fully supports the finding by the trial court that "the $814,000 payroll figure was *exactly* twice that reported by defendant's using a 26 week basis." Thus, the provision of paragraph 5 in the letter stating "payroll for the year 1969 be continued as the basis of our normal method of calculation of the average weekly limitation" was an agreement that the 52 week base for 1969 would be the standard for future operations.

Moreover, it is clear from the record that Sea Drilling Corporation immediately recognized the 52 week standard for reporting, and accepted a return premimum for approximately $60,000 in 1971, a figure that was arrived at by using the 52 week basis.

The appellants' contention that the July 10 letter quoted above does not include a preliminary paragraph in the letter received by Hardin & Ferguson, Inc. from the Highlands Insurance Company, and that this failure made the numbered paragraphs either inoperative or ambiguous is without merit. The omitted paragraph merely contained Highlands' explanation as to why it was insisting upon the terms that were enumerated in the July 10 letter. Since these terms are readily understandable, it is unimportant that the insurance agency did not also include the entire Highlands letter.

The second issue raised by the appellants is that the premium charged Sea Drilling, Inc. included the higher rate for drilling personnel as to three persons who were claimed by the insureds to be shore based supervisory or executive persons. The amount involved here is quite small, and the trial court noted that the insureds' trial brief did not discuss it. The court stated:

> There was virtually no evidence to support the contention. Defendant's trial brief did not discuss it and their post-trial memorandum cites only the testimony of a Sea Drilling tool pusher to the effect that to his knowledge supervisors visited the rigs three and four times a year. There was no evidence of which supervisors these were or which supervisors were or were not classified improperly.
>
> This was insufficient to support defendant's claim for a credit based on a reclassification of unspecified personnel.

[2] The defendants contend that the trial court erred in placing the burden upon them in their effort to challenge the "classification" of these three executives, citing *Royal Indemnity Co., Inc. v. Shreveport Macaroni Co.*, 11 La.App. 628, 124 So. 595 (1929). The cited case simply does not support the defendants' contention. In that case, the insurance company had instituted an action to recover judgment against an insured for an alleged balance due for premiums computed much as are those in the case before us. The court said:

> The audit made was not filed in evidence, and there is not any proof in the record that either the audit or classification based thereon was correct, and while the officers of the *defendant* testify that they had submitted a statement of the amount of payroll and classification thereon, and had made payments in accordance therewith, it is not shown that the pryroll was correct or that the classification was in accord with the schedule under which the classification should have been made, and the schedule of classification was not offered in evidence. [Emphasis added.]

Upon this statement the court held that the trial court should have dismissed the claim "as of nonsuit." The case is silent as to the burden of proof in which an insured either makes out a classification of employees or accepts such a classification submitted by the insurance company for payroll purposes and later undertakes to show that the classification is improper. In fact, it appears from the *Royal* case as if the court was stating that the proof offered by the defendant was insufficient. The facts here were not sufficiently developed for us to know whether the original classification of these executives for payroll purposes is one that was either made by the insureds or one which was accepted by them as the basis for making the regular audits until such time as exception was taken in this lawsuit. Under these circumstances, we cannot say that the trial court erred in placing the burden of proof on the parties who challenged the correctness of the schedules.

The appellants next argue that the policies covering onshore personnel and others than those working offshore

were void and that therefore no premiums could be found to be due on them, because the retrospective rating plan contained in the offshore policy, which was adopted by endorsement of the onshore policies, had not been filed with the proper insurance officials of the state of Louisiana, citing LSA-R.S. 22:1407A(1), 22:1420, 22:1402 and 22:620 all as amended. [1] The insurance company responds by pointing to the trial court's finding of fact that the respective policies had been filed and, alternatively, contends that the mere failure to file would not avoid the policy completely. It supports its contention with respect to the legal issue by citing § 22:653 which reads, under the heading "Validity of Noncomplying Forms:"

> Any insurance policy, rider or endorsement hereafter issued and otherwise valid, which contains any condition or provision not in compliance with the requirements of this Code, shall not be rendered invalid thereby, but shall be construed and applied in accordance with such conditions and provisions as would have applied had such policy, rider or endorsement been in full compliance with this Code.

[3] We conclude that there was sufficient evidence from which the trial court could find, as it did, that the endorsement had actually been filed. As to the alternative

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1. The offshore policies, about which the major part of this case centers, deal with coverage outside the territorial waters of Louisiana, and they are not subject to filing under the local law.

position taken by the insurance company, the appellants cited no Louisiana case holding that the failure to file an insurance policy endorsement voids the policy. They did not respond to Highlands' reliance on LRS 22:653 "Validity of Noncomplying Forms." They have not, thus, established to our satisfaction the proposition that the failure to file rendered the endorsement ineffective. *Cf. Elston v. Shell Oil Co.*, 376 F.Supp. 968 (E.D.La.1973), *aff'd without opinion*, 495 F.2d 1371 (5th Cir. 1973).

[4] Finally, the defendants contended that the policies for the three assureds could not be combined for rating purposes because there had been no election to combine. The trial court reviewed the evidence and considered the circumstances, including the course of conduct between the parties and manner in which the accounts were handled and concluded: "that the preponderance of the evidence lay with plaintiff and established that there was in fact an agreement to combine the policies for rating purposes." We conclude that this finding of fact by the trial court is not clearly erroneous. It must, therefore, be sustained.

The judgment is AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 77-1577

D. C. Docket No. CA-72-2551 "H"

HIGHLANDS INSURANCE COMPANY,

Plaintiff-Appellee,

versus

AMERICAN MARINE CORPORATION,
LOUISIANA MATERIALS CO., INC.
AND SEA DRILLING CORPORATION,

Defendants-Appellants.

Appeal from the United States District Court
for the Eastern District of Louisiana

Before TUTTLE, GOLDBERG and RANDALL, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the

said District Court in this cause be, and the same is hereby, affirmed;

IT IS FURTHER ORDERED that the defendants-appellants pay to the plaintiff-appellee the costs on appeal, to be taxed by the Clerk of this Court.

December 5, 1979

ISSUED AS MANDATE:

A-12

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 77-1577

HIGHLANDS INSURANCE COMPANY,

Plaintiff-Appellee,

versus

AMERICAN MARINE CORPORATION,
LOUISIANA MATERIALS CO., INC., and
SEA DRILLING CORPORATION,

Defendants-Appellants.

Appeal from the United States District Court
for the Eastern District of Louisiana

(January 18, 1980)
ON PETITION FOR REHEARING

Before TUTTLE, GOLDBERG and RANDALL, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED

ENTERED FOR THE COURT:

United States Circuit Judge